

42: SCOPE OF BARGAINING

The hearing examiner “does not believe that the Act’s policy would be furthered by resolving the permissive-mandatory debate as an unfair labor practice.... The Act’s policies would be furthered if the parties are merely left to their agreement.” **ULP #13-83**

42.1: Mandatory Subjects [See also 53.11, 55.91, 72.54, 72.589, 73.45, and 73.477.]

“This Board has never attempted to establish a list of rules to be used to make a determination of whether a matter is a mandatory subject of bargaining as a panacea to this problem. It has chosen rather to take each problem case-by-case.... There is a definite trend, however, toward adoption of a balancing approach in determining what is and what is not a mandatory topic of collective bargaining.” **ULP #13-76**

“Mandatory subjects are those which regulate wages, hours and other conditions of the employment relationship, and, over which both parties must bargain in good faith.” **ULP #43-79**

“The fact that state law does not require a hearing for a non-tenured teacher does not proscribe it as a mandatory subject over which Defendant must bargain.” **ULP #43-79**

“Wages, hours and working conditions represent the foundation of all collective bargaining. The impact of wages on an individual employee is ultimate. The placement of an employee on a pay plan or matrix must be negotiable. Considerations for the effect on the employer’s operations must be set aside.... The transfer [from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan] may affect an employee’s classification and pay rate and...would be a mandatory subject of bargaining.” **ULP #10-86.**

“Pursuant to Section **39-31-305 MCA** wages, hours and fringe benefits are compulsory subjects of bargaining.... Workers Compensation disability benefit supplementation payments are a compulsory subject of bargaining. See **NLRB v Allis-Chalmers Corporation**, 102 LRRM 2194, 601 F.2d 870, CA 5 (1979); **Southern California Edison**, 126 LRRM 1324, 284 NLRB 142 (1987) and **NLRB v Laredo Coca Cola Bottling Company**, 103 LRRM 2904, 613 F.2d 1338, CA 5 (19480).” **ULP #34-87.**

“The language proposed by the County on hours of work and scheduling is clearly a mandatory subject of bargaining. The holidays are a subject also recognized as a mandatory subject of bargaining, **Singer Mfg. Co. v. NLRB**, 313 U.S. 595, (1941), 8 LRRM 740. Moreover, the Board of Personnel Appeals has recognized that Montana statutes dealing with public employees are

concerned with wages, hours and working conditions, mandatory subjects, ***Florence-Carlton v. School District No. 15-6*, ULP 5-77**. Holiday pay is not only a statutory right but also a condition of employment and therefore a mandatory subject of bargaining. See **38 AG Opinions #38, 1980.** ULP #7-89.

“It is agreed that holidays are a mandatory subject of bargaining.” ULP #31-89.

42.11: Mandatory Subjects – Case Law

The Kansas Supreme Court adopted a balancing test for determining mandatory and permissive subjects when it said: “The key ... is how direct the impact of an issue is on the well being of the individual teacher, as opposed to its effect on the operation of the school system as a whole’.” The Board has adopted this balancing test. **ULPs #13-76 and #5-77**

“[A]n employer has to meet all the items of the Westinghouse standard in order to be relieved of the duties to bargain....” ULP #9-83

See also **ULPs #6-77, #20-78, #30-79, #31-79, #7-80, and #34-80.**

“To determine which subjects are mandatory subjects of the bargaining this Board has utilized the balancing test adopted by the Kansas Supreme Court in 1973 (***N.E.A. v. Shawnee Mission Board of Education*, 512 P.2d 426, 84 LRRM 2223**) and followed by the Pennsylvania Supreme Court (***Pennsylvania Labor Relations Board v. State College Area School District*, 337 A2d 262 90 LRRM 2081**).... See also **ULP #5-77, *Florence-Carlton Unit of the Montana Education Association v. McCone County School District #1.*** ULP #10-86

See also **ULP #7-89.**

42.12: Mandatory Subjects – Statutory

“Most Montana statutes relating to public employment are concerned with wages, hours and working conditions ... mandatory subjects....” ULP #5-77

“The obligation of a Montana public employer and the public employees’ representative under Title 59, Chapter 16, RCM 1947 is to negotiate in good faith on wages, hours, fringe benefits and other conditions of employment. Those four subjects of bargaining are the limits of the parties’ statutory responsibility. On other subjects the parties are under no obligation to bargain.” ULP #19-78

See also **ULPs #17-78, #20-78, #30-79, #47-79, #7-80, #33-81, and #37-81.**

See **ULPs #10-86 and #7-89.**

42.2: Permissive Subjects [See also 53.11, 55.92, 72.54, 72.589, 73.45, and 73.477.]

“Permissive subjects are those which deal with matters other than wages, hours, and working conditions, and, over which neither party is required to bargain.” **ULP #43-79**

“Those things which are ordinarily in the purview of only one party, i.e., internal union affairs or management’s right to hire, and fire are permissive subjects of bargaining. A party does not have to bargain over permissive subjects.” **ULP #14-89.**

See also **ULP #7-89.**

42.21: Permissive Subjects – Case Law

“[F]urther division between mandatory and permissive subjects of bargaining may be useful, viz., those things which are ordinarily in the purview of only one party, i.e., internal union affairs or management’s right to hire or fire are those things which are permissive subjects of bargaining.” **ULP #5-77**

“A recognition clause is not a condition of employment; therefore, I must conclude that our statute does not require bargaining on the subject.” **ULP #19-78.** See also **UC #1-81.**

“The proposal on the recognition clause submitted by the Employer is not a mandatory subject of bargaining under **39-31-305 MCA.**” **ULP #45-81**

See also **ULP #20-75.**

“[C]reation of a fourth battalion chief position.... is a permissive subject of bargaining. ‘By once bargaining and agreeing on a permissive subject, the parties, naturally do not make the subject a mandatory topic for future bargaining.’ See ***Allied Chemical and Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.***, 404 U.S. 157, 78 LRRM 2974, 2985, (1971).” **ULP #14-89.**

42.22: Permissive Subjects – Statutory

“The prime question was whether the state had a continuing obligation to bargain under the order issued on January 17, 1979, by the Board after the legislature removed the requirement from the act that ‘the state negotiate anything relevant to the determination of reasonable classifications and grade level....’ It seems clear that when the legislature repealed that part of the act it automatically changed it from a mandatory subject of bargaining to a permissive subject.” **ULP #47-79**

See also **ULPs #13-76 and #5-77.**

42.3: Prohibited Subjects [See also 53.11, 55.92m 72.54, 72.589, 73.45, and 73.477.]

“Illegal subjects are those which would require an unlawful act or an act inconsistent with the basic public policy of the Act.” **ULP #43-79**

42.31: Prohibited Subjects – Case Law

See **ULP #5-77.**

42.32: Prohibited Subjects – Statutory

See **ULPs #5-77 and #31-79.**

42.42: Determination of Subject Status – Balancing Employee and Employer Rights

“The Kansas Supreme Court in **NEA vs. Shawnee Mission Board of Education (1973) 512 P.2d 426, 84 LRRM 2223** set forth the following balance between the scope of bargaining and management rights: ‘... The key ... is how direct the impact of an issue is on the well-being of the teachers, as opposed to its effect on the operation of the school system as a whole...’.” The Pennsylvania Supreme Court “in **Pennsylvania Labor Relations Board vs. State College Area School District (1974-75) 337 A.2d 262, 90 LRRM 2081** ... used the Kansas Supreme Court test to strike a balance between Section 701 [Scope of Bargaining] and 702 [Managerial Policy].... The Pennsylvania Supreme Court stated: ‘ ... where and item of dispute is a matter of fundamental concern to the employee’s interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under Section 701 simply because it may touch upon basic policy...’.” **ULP #20-78**

“[W]here the effect of the employer’s action upon section 7 rights is significant, motive is irrelevant. In that type of case the establishing of a legitimate business justification is of no avail. Where the effect is minor, however, the action will be deemed to be justified when significant and legitimate interests of the employer are shown.” **ULP #29-84**

See also **ULPs #13-76, #5-77, #6-77, #30-79, #31-79, #43-79, #7-80, #34-80, and #9-84 and DR #1-80.**

42.44: Determination of Subjects Status – Conflict with Laws [See also 46.2.]

See **ULP #5-77**.

42.45: Determination of Subjects Status – Custom and Practice [See also 72.612.]

An individual teacher contract may not be substituted for a master agreement. The function of an individual contract is to state the teacher's intention to teach for the academic year. **ULP #17-75**

See also **ULPs #31-79 and #43-79**.